United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Orig w/ affidavit of mailing

75-3025

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-3025

SONJA JOHNSON,

Petitioner,

—against—

HONORABLE JACOB MISHLER, CHIEF JUDGE
FOR THE EASTERN DISTRICT OF NEW YORK,

Respondent.

PETITION FOR REHEARING OR REHEARING *EN BANC*

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United States Attorney,
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Assistant United States Attorney,
Of Counsel.

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PRELIMINARY STATEMENT

The respondent herein, Chief Judge Jacob Mishler of the United States District Court for the Eastern District of New York hereby petitions for rehearing en banc of a decision dated July 14, 1975 (Slip opinions, p. 4807) which ordered respondent Chief Judge to reinstate petitioner as a probation officer for the District Court; retain her on the Court's payroll; and afford her a hearing. The petition for rehearing en banc is filed pursuant to Rule 35 (a)(2) of the Federal Rules

of Appellate Procedure which provides that, although such petitions are not favored, they are appropriate "when the proceeding involves a question of exceptional importance." Moreover, given the fact that the opinion states that this Court has jurisdiction over a class of original proceedings, beyond its statutory jurisdiction to review, respondent believes that en banc review is further warranted by the Court's need to "(1)... secure or maintain uniformity of its decisions,..."

The exceptional importance of this matter lies in the tension which the decision creates between the clear Congressional mandate in 18 U.S.C. §3654 that probation officers serve "under the direction of the Court making such appointment" and the panel's decision to repose in random Second Circuit panels an undefined "supervisory power" which, in the context of the instant case undermines the district court's ability to implement the mandate contained in §3654. Respondent believes that such a unique view and expansion of this Court's jurisdiction would be appropriate, by itself, for en banc review. The fact that the expansion directly involves a crucial aspect of the administation of criminal justice makes en banc review compelling.

STATEMENT

1. On April 30, 1975, following a year of essentailly unsatisfactory work, petitioner was discharged by respondent from her employ as a probation officer in the District Court. She had been appointed in April, 1974. Petitioner's discharge was authorized by 18 U.S.C. §3654 which expressly provides that a district court "may in its discretion remove a probation officer serving in such court."[1/]

Petitioner took immediate steps to regain her job. However, rather than pursuing her efforts in the District Court pursuant to the district court mandamus provisions of 28 U.S.C. §1361, petitioner brought on an original proceeding in this Court seeking to invoke this Court's jurisdiction under the All Writs Act, 28 U.S.C. §1651(a). The petition consisted solely of a statement by petitioner's counsel which described the events that led to petitioner's discharge plus gratuitous conclusions

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1/ What the panel has characterized as the "Regulations" of the United States Probation System are published by the Administrative Office of the United States Courts in a document styled "Administrative Manual." The statutory scheme which created the Administrative Office expressly disavows any intent to authorize the Administrative Office to interfere in the "authority of the courts to appoint their own administrative or clerical personnel..." 28 U.S.C. §609. Although the statute does not mention except by implication, the Court's power to discharge employees, the Administrative Manual recognizes, PO - 8.12(A)(4), that "The terms of office of probation officers...continue indefinitely at the pleasure of the court." (Cited portions of the Administrative Manual have been appended to this petition).

by counsel. Counsel also attached copies of some correspondence which, for the most part, he had generated on petitioner's behalf soon after he was retained in April. Thus, a petition for the issuance of a writ of mandamus was filed in this Court which, inter alia, did not relate to an "action in the trial court"; did not involve "parties" to such a proceeding; and, finally, because it sprung from nowhere, had no "record" from which this Court could understand "the matters set forth in the petition." F.R. App. Proc., 21(a) and (b).

In sum, petitioner sought review not only of a discretionary decision of a district court judge but, in addition, did so outside the context of any action or proceeding in the district court. In essence, petitioner had started an original proceeding in this, a Court the jurisdiction of which is exclusively appellate.

Against that background, petitioner's attorney claimed on the merits that petitioner was entitled to a pretermination hearing before she was discharged. On the jurisdictional point, petitioner urged that, under the decision in Sampson v. Murray, 415 U.S. 61 (1974), a writ of mandamus from this Court was the appropriate means by which to vindicate that right.

According to petitioner, Sampson v. Murray stood for the proposition that under the All Writs Act this Court could,

under its "equitable power," compel respondent to grant petitioner a hearing and enjoin her discharge (Pet. 12). Respondent contended that Sampson hardly stood for such a novel proposition and, indeed, further demonstrated that mandamus jurisdiction was present only when there was some ultimate appellate remedy in this Court which could ripen out of the "proceedings" which had resulted in her discharge (Ans. 7, 9-11). Thus, the issue which was joined under the Sampson decision was whether mandamus would lie in this Court.[2/]

The panel, however, never determined that dispute, choosing instead to expressly disavow any reliance upon this Courts' mandamus jurisdiction under the All Writs Act (Slip op. at 4811):

> The petitioner urges that Sampson v. Murray, 415 U.S. 61 (1974) is controlling while respondent says that it is inapposite. But we need not rely on the All Writs Act. We believe that jurisdiction is present in the exercise our supervisory power over the administration of the courts. United States v. Dooling, 406 F.2d 192, 198 (2d Cir. 1969); United States v. Weinstein, 452 F.2d 704, 708-709 (2d Cir. 1971).

Having thus determined that it had original jurisdiction, the panel ordered that, on the merits, petitioner be reinstated and given a hearing.

2/ Obviously, petitioner made no claim that appellate jurisdiction was present under either 28 U.S.C. §§1291 or 1292.

2. As already noted, the "record" in these proceedings consist of the facts and conclusions alleged in the petition together with the various exhibits annexed to it by petitioner's counsel. Despite counsel's best efforts, the sum of these materials show that petitioner was "carried" as an employee for at least the eight months preceding her discharge; that in September she was told her work was unsatisfactory; that she was given a reduced case load, special tutoring help but that by April, the first anniversary of her appointment, the Chief Probation Officer, James F. Haran[3/] could no longer justify her continued employment. Accordingly, early in April, Mr. Haran advised petitioner in person that because she could not cope with a full workload her employment would be terminated as of the end of the month. Petitioner was given the opportunity to resign before then.

It was at this point that petitioner retained counsel, who requested (1) production of the presentence reports which had been found wanting in content; (2) a 30 day stay of petitioner's discharge; and (3) a pretermination hearing before respondent "or other judicial officer" where petitioner would demonstrate that her presentence reports were not inadequate. All of these requests were denied by respondent.

3/ Under 18 U.S.C. §3654, ¶5, a chief probation officer may be designated by the district court where there is at least one other probation officer in the district court.

In urging that she was entitled to a pretermination hearing, petitioner's main contention centered on the following pertinent provisions of PO-8.30 of the Administrative Manual:

> EFFICIENCY RATINGS. The following method is used to estimate the efficiency of probation personnel for the purpose of determining their eligibility for promotion under this plan:
>
> A. The Rating Officer. The chief judge if there is more than one judge, otherwise the judge, will rate without review the chief probation officer in districts having more than one probation officer, and in other districts the probation officer. The chief probation officer in districts having more than one probation officer, and in other districts the probation officer, will rate the other members of his staff.
>
> B. The Scale of Efficiency. The classification used for rating the efficiency of employees will be "excellent," "very good," "good," "fair," and "unsatisfactory," and these terms will have the meaning commonly given them.
>
> * * *
>
> D. The Review of Ratings. Every employee must be given notice of his adjective rating in writing by his rating officer. Any employee, except one whose rating rests in a judge without review, who desires to appeal his efficiency rating will be given an opportunity to do so in writing, within 10 days of receipt of written notice of the rating. The appeal of probation personnel is to the district judge or to the chief district judge if there is more than one judge of the district. A hearing will be held by the judge in the presence of the employee and the rating officer. Both the employee and the rating officer or either may be represented in the hearing by another person at the option of both or either. The judge will determine the final efficiency rating to be assigned without further review.

Petitioner claimed that because she was entitled to a hearing on her efficiency rating (which had been "fair") she was certainly entitled to a hearing before she was discharged, even though the administrative manual said nothing of such a hearing and even though PO-8.30 related soley to promotions.

The panel in this case reached essentially the same conclusion although for a different reason. It concluded that petitioner had somehow been euchred into believing, all along, that she would be retained as a probation officer. Under those circumstances, the panel determined that petitioner should be entitled to a hearing prior to discharge (Slip op. at 4810-11):

> After an employee has been given an annual rating consistent with continued employment, to turn around and discharge her for inefficiency without according her the hearing to which she was entitled under Section 8.30(D) would be to circumvent and defeat that Regulation, since the employee, had she been advised earlier of her proposed dismissal, could have invoked her Section 8.30(D) right to a hearing at that time. Yet that was the procedure followed in petitioner's case.

Although much can be said concerning the panel's conclusion that there was a "turn around," a few brief statements should suffice. First, one can hardly imagine that a rating of "fair," the fourth lowest on a scale of five could, even in

isolation, be considered as "consistent with employment."[4/] But even if it could, in this case the "fair" rating was coupled with the previous advice to petitioner in September that her work was not satisfactory plus a continuous course of tutoring as well as a reduced case load. Indeed, petitioner never claimed that she was fooled by the "fair" rating into believing that her employment would be continued. Instead, her attorney's post facto explanation for not seeking a review of the efficiency rating was her "apprehension that by doing so she would antagonize her superiors and unduly strain her working conditions" (Pet. at 5, n). This explanation hardly comports with the panel's conclusion that petitioner was led to believe that her position was secure. Instead, although misguided, the explanation more readily suggests that petitioner believed her position to be so insecure that she did not wish to incur the personal ill-feeling of the Chief Probation Officer.

There is an additional suggestion in the panel's opinion that, in addition to the "fair" rating, a further indication of petitioner's "continued employment" was that she was, as the panel

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4/ Thus, by virtue of the "fair" rating, petitioner was automatically disqualified from consideration for a within-grade promotion. PO-8.29(E).

quoted from Mr. Haran's letter of April 11, "eligible to be considered for promotion to grade 11 level" (Slip op. at 4811). Petitioner's "eligibility," however, had nothing to do with her merit, but was simply a function of her employment for one year. (See PO-8.29 "Associate probation officer - JSP-11). Further, her employment for one year was not consistent with continued employment because for the entire period following September, when she had been told that her work was unsatisfactory, she was, as noted, under close supervision with a reduced work load. Finally, because petitioner was a probationary employee in September, there could have been no thought in petitioner's mind that her job was so secure that she could with impunity let the "fair" rating pass without seeking review. Of course, hindsight allows the observation that by foregoing the efficiency rating review, petitioner unwittingly created - according to the panel's decision - a right to pretermination hearing, which, it should be noted, was unavailable to the employee in Sampson v. Murray, supra.

Despite, then, the fact that petitioner did not request a hearing until a week before the day of her discharge; despite the fact that petitioner was never told that her work was satisfactory much less that her employment would be continued; and

despite the complete absence of any provision in the Administration Manual allowing for pretermination hearings, the panel herein determined that the "procedure" followed was "in violation of Section 8.30(D)..." (Slip op. at 4811). Moreover, despite the fact that every reasonable effort was made to give petitioner individualized on-the-job training, the panel herein concluded that "such a situation should not be tolerated in the courts of all places" (Slip op. at 4812).

ARGUMENT

THIS COURT HAS NO JURISDICTION TO COMPEL RESPONDENT TO REINSTATE AND GRANT PETITIONER A PRETERMINATION HEARING

This Court's concern over the appropriate scope of the jurisdiction of district courts, see D'Allesandro v. United States, ____F.2d____ (2d Cir. Slip op. 3387, decided May 1, 1975); United States v. Huss, ____F.2d____ (2d Cir. Dkt. No. 75-1192 [typed]; decided July 25, 1975), has been matched by its concern over keeping within the bounds of its own jurisdiction. See, e.g., International Business Machines Corp. v. United States, 480 F.2d 293, 295-299 (2d Cir. 1973) (en banc) rev'g 471 F.2d 507 (1972). In this proceeding, there was clearly no jurisdiction in this Court to compel respondent to reinstate petitioner pending a pretermination hearing. Moreover, though the panel herein may have been prompted by petitioner's situation to create new concepts of jurisdiction, it is not enough, in deciding the jurisdictional question, to ask what a "good man would wish to do,...". See D'Allesandro, supra, slip op. at 3399, quoting from Cardozo, The Nature of the Judicial Process (1921).

1. In refusing to determine whether Sampson v. Murray, supra, provided support for petitioner's contention

that this Court could invoke its"equitable power" under 28 U.S.C. §1651(a), the panel herein stated (Slip op. at 4811),

> "*** But we need to rely on the All Writs Act. We believe that jurisdiction is present in the exercise of our supervisory power over the administration of the courts. United States v. Dooling, 406 F.2d 192, 198 (2d Cir. 1969), United States v. Weinstein, 452 F.2d 704, 708-709 (2nd Cir. 1971).

Respondent is aware of no authority for the exercise by this Court of original subject matter jurisdiction and no support has been found for the extraordinary language of the decision in this case which finds, in effect, a third class of "jurisdiction present in the exercise of [this Court's] supervisory power over the administration of the courts." The cases cited by the panel, United States v. Dooling, 406 F.2d 192, 198 (2d Cir.), cert. denied sub nom. Persico v. United States, 395 U.S. 911 (1969) and United States v. Weinstein, 452 F.2d 704, 708-709 (2d Cir. 1971), cert. denied sub nom Grunberger v. United States, 406 U.S. 917 (1972), offer no support for such a unique proposition. Instead, each of those cases confirm the fundamental principle that this Court's jurisdiction, which is purely statutory (see Moore's Federal Practice, §§110.01, 110.28 and cases cited therein), must be found through either the statutes conferring direct appellate jurisdiction (e.g., 28 U.S.C. §§1291, 1292; 18 U.S.C. §3731), or alternatively, conferring mandamus

jurisdiction (The All Writs Act, 28 U.S.C. §1651). These cases under the most generous reading stand for no more than the proposition that: "...that the phrase 'in aid of their respective jurisdictions' should not be read so as to prohibit them [courts of appeals] from vacating orders, in actions generally subject to their supervision, that were beyond the power of the lower court to make, even though in the particular case there was no frustration of an appeal" Weinstein, supra 452 F.2d at 711. Thus, although the issuance of the writ in each of those cases involved so-called "supervisory" writs of mandamus, the Court's jurisdiction was placed squarely upon §1651 and not simply on a vague notion that, so long as some individual brought a grievance to this Court, it could compel the conduct of a district court judge, i.e. "supervise" the district court.[5/]

2. In the event that it should be determined, on rehearing, that there is no original jurisdiction in this Court to entertain the matters complained of in the petition, it would be necessary for this Court to consider the jurisdiction to issue as well, if necessary, the propriety of issuing, a writ of mandamus.

5/ It would seem that if separate panels of this Court were all that was needed to supervise the district courts, then Congress would have no need to enact 28 U.S.C. §332 creating judicial councils.

Respondent will not repeat at length his contention concerning petitioner's reliance on Sampson v. Murray as a predicate for invoking this Court' supposed "equitable" mandamus jurisdiction. Respondent urged originally that the writ of mandamus supplements this court's appellate jurisdiction to review the decisions and conduct of district judges functioning in actual cases before the district court, qua court. The employee in Sampson v. Murray, as was pointed out by respondent, was pursuing an appeal before the Civil Service Commission, following her discharge, when she sought and was granted interim injunctive relief from the district court staying her discharge pending the outcome of administrative review proceedings. That relief had been affirmed in the court of appeals which had reasoned that district courts has jurisdiction to order the retention of government employees. In concluding as it did, the court of appeals relied upon Scripps-Howard Radio v. F.C.C., 316 U.S. 4, 9-10 (1942), a case in which the court, citing the All Writs Act, held that an appellate court could stay final agency action. In Sampson, however (supra, 415 U.S. at 73), the court noted, in reversing the court of appeals, that the stay in Scripps-Howard was sought pending "statutory judicial review." Thus, rather than embracing petitioner's notion of "equitable"

mandamus, the Supreme Court in Sampson recognized, as this Court did in International Business Machines Corp. v. United States, supra, 480 F.2d at 299, that jurisdiction under the All Writs Act must find some nexus in an ongoing or completed district court or agency proceeding which, at the least, will or is capable of ripening into a proceeding falling within a court of appeals' appellate jurisdiction. In that manner, the statute, which requires that the writ issue in aid of a court's jurisdiction may, in the case of courts of appeals, issue in aid of the court's "appellate jurisdiction." Sampson, supra, 415 U.S. at 73.

The Dooling and Weinstein cases hardly detract from the clear reading of Section 1651(a). In each of those cases, this Court issued a writ of mandamus following action by a district court judge which, had it gone unchecked, would have prevented this Court from reviewing on appeal the several judgments of conviction involved. Thus, mandamus jurisdiction was found precisely because there was a substantial likelihood that this Court's appellate jurisdiction would be curtailed in a highly significant area. An examination of the nexus in this proceeding or what was phrased in the Weinstein decision (452 F.2d at 711) as "actions generally subject to [courts of appeals]

supervision," reveals that there is simply no predicate nor occasion for this Court's involvement. Plainly, there is no appellate predicate. There was never a point during the proceedings in which there was even a burgeoning appellate remedy because there has never been an action brought in the district court. Certainly, under International Business Machiness Corp. v. United States, supra, there is no proper basis for mandamus.[6/]

Beyond the clear absence of at least an inchoate appellate remedy, however, is the clear intent of Congress to vest with district courts exclusive and discretionary jurisdiction over the removal of probation officers, 18 U.S.C. §3654, ¶3, without any hearing or appellate rights.[7/] Thus it can hardly be stated, as it was in Weinstein, supra, 452 F.2d at 713, that respondent's conduct was without power "and inconsistent with 'accepted principles and usages of law'".

6/ See also Whitney v. Dick, 202 U.S. 132, 136 (1906) holding that circuit courts of appeal have no jurisdiction to issue a writ of habeas corpus upon an original proceeding: "There was no proceeding of an appellate character pending in the Court of Appeals for the complete exercise of jurisdiction in which any auxiliary writ of habeas corpus was requisite."

7/ This is not to say that petitioner lacks a forum in which to present her claimed deprivation of a right to a hearing. 28 U.S.C. §1361 clearly provides such a remedy and, moreover, allows for an eventual appeal to this court. By itself the existence of this remedy in the district court should be reason enough for this Court, as a matter of discretion, to refuse to issue a writ of mandamus.

The limited right of a probation officer to have his or her efficiency rating reviewed by the chief judge seems hardly to be, as the panel states (Slip op. at 4810), an effort by the Administrative Office to impose upon district courts a requirement which is nowhere authorized by Congress. Indeed, the hearing spelled out in PO-8.30(D) has nothing whatever to do with the discharge of probation officers.[8/] It is simply an effort to place probation officers in large districts on a par with single probation officers who are rated directly by district judges. See PO-8.30(A). In all events, the failure of respondent to accord petitioner a review of her efficiency rating nearly six months after it was given is not comparable to the conduct of the district judges in the Weinstein and Dooling cases and to hold that respondents' actions were without power and inconsistent with "accepted principles and usages of law" is, even on the bare "record" of this case, insupportable.

8/ The Administrative Manual expressly recognizes, twice, that employees serve at the "pleasure of the court." See PO-8.12(A)(4); 8.13(B). Thus, because PO-8.30 states that it relates to promotions, it is difficult to fathom the panel's conclusion that 8.30 was designed to impede the district court's discretionary authority to discharge employees. Moreover, even if it was so designed it would seem afoul of 28 U.S.C. §609 and its limitation upon the power of the Administrative Office. In addition, it seems self-evident that if the Judicial Conference, through the Administrative Office, has no power to require a hearing in the face of Section 609, then this Court, sitting by regular panel similarly lacks power to construe the Administrative Manual in such a manner as to create the right to such a pretermination hearing.

CONCLUSION

The petition for rehearing, or in the alternative, for rehearing en banc should be granted, and the petition should be dismissed for want of jurisdiction or in the discretion of the Court.

Dated: July 28, 1975

Respectfully submitted,

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ADDENDUM

CHAPTER 8. PERSONNEL

Section 1. Qualification Standards and Duties of Probation Personnel

8.1 APPOINTING AUTHORITY.

A. Probation Officers. The judges of the district courts have sole authority to appoint probation officers. The statute which provides for the appointment by the court of ". . . one or more suitable persons to serve as probation officers within the jurisdiction and under the direction of the court making such appointment . . ." also says that a court ". . . may in its discretion remove a probation officer serving in such a court." (18 U.S.C. 3654; 28 U.S.C. 609)

B. Probation Officer Assistants and Clerical Personnel. There is no statutory requirement that probation officer assistants or clerical personnel be appointed by the court. To conserve the court's time this responsibility may be delegated by the court to the chief probation officer or the officer in charge.

8.2 PROBATION OFFICER QUALIFICATION STANDARDS. In October 1940, the Judicial Conference declared "that in view of the responsibility and volume of their work, probation officers should be appointed solely on the basis of merit without regard to political considerations; and that training, experience, and traits of character appropriate to the specialized work of a probation officer should in every instance be deemed essential qualifications." In September 1942 the Conference recommended to the various district courts that in all future appointments of probation officers the appointee should be required to possess qualifications of exemplary character, good health and vigor, appropriate age, and education of not less than a bachelor's degree and at least 2 years' professional experience. In 1961 the Conference adopted specific qualification standards which are described in paragraph 8.29.

8.3 DUTIES OF PROBATION PERSONNEL.

A. Chief Probation Officer. A chief probation officer is responsible, in accordance with the applicable statutes (18 U.S.C. 3654-3655), Judicial Conference, Administrative Office, and court policies, for the probation program of the court he serves. He performs duties and responsibilities such as the following:

separation but a statement of the number of hours of compensation due during the pay period in which the separation occurs. This statement should also include the number of hours of accumulated annual leave to the employee's credit at the time the separation becomes effective. If the employee is indebted for leave or if leave is to be transferred to another federal agency these facts should be entered in the appropriate space. It is also necessary that the reason for the resignation, retirement, or involuntary separation be given so these facts will be available to the Administrative Office if an inquiry is received from a state employment agency prompted by an application from the former employee for unemployment compensation.

8.12 APPOINTMENTS.

A. General Provisions. The following provisions applicable to all probation personnel must be observed:

1. Appointment Date. The appointment date must coincide with or precede the date of entrance on duty. In no event will the General Accounting Office approve the payment of salary to an employee for any period prior to the appointment date, when the appointment postdates the entrance on duty.

2. Oath of Office. It is preferable that the oath of office on A.O. Form 79, "Appointment, Oath of Office, and Personal History Statement" (see Appendix A-8.6) be signed prior to or on the date of entrance on duty, although it may be done at any time. No employee, however, may be paid until the oath has been executed (5 U.S.C. 5507). Form 79 contains 4 oaths or affirmations and certification to the "Personal History Statement."

3. Social Security Number. Form 79 must include the social security number of the appointee or a statement that a number has been applied for. If the latter, the chief probation officer or officer in charge is responsible for forwarding the number to the Personnel Division as soon as it is received.

4. Term of Office. The terms of office of probation officers and clerical employees continue indefinitely at the pleasure of the court. It is unnecessary to have new court orders if they are to be continued in office after the retirement, resignation, or death of a judge.

5. Data on Former Employee. When a new appointee fills a position made vacant by the separation, resignation, or retirement of a probation officer or clerk, all papers

I. Appointment of Part-Time Employees. Part-time employees (both officers and clerical) are appointed in the same manner as full-time personnel.

8.13 PROBATIONARY PERIOD OF APPOINTMENT.

A. Judicial Conference Recommendation. The Judicial Conference of the United States has recommended that the appointments of probation officers should be for a probationary period of 6 months, the appointment then to become permanent if the appointee's service is deemed satisfactory by the court (Report of the Committee on Standards of Qualifications of Probation Officers, 1942).

B. Procedure. Since a probation officer serves at the pleasure of the court (18 U.S.C. 3654) it is not necessary that the order of appointment specify that it be for a probationary or temporary period of 6 months. Such an order may bar the appointee from participation in the retirement, group life insurance, and health benefits programs until he achieves permanent status. It is preferable that the appointment order include no reference to probationary or temporary status but that the appointee be informed in writing of the probationary nature of his position.

8.14 AUTHORITY FOR PAYMENT OF COMPENSATION. After receipt of the necessary appointment papers the Administrative Office will authorize payment of compensation by issuance of A.O. Form 143 "Certification of Changes in the Judiciary" (see Appendix A-8.1). This form is commonly referred to as the "Personnel Notice."

8.15 PROMOTIONS. Advancements from one grade to another are not automatic. They are considered individually. See Classification of Positions, paragraph 8.29D. A.O. Form 143 is issued to authorize a change of grade with increase in compensation.

8.16 CHANGE OF NAME. If a probation officer or clerk-stenographer changes his or her name by marriage, divorce, or other court action, the change and effective date should be reported promptly to the Personnel Division. Form 143 will be issued to cover the name change. The name should be given as it will appear on future payrolls. If the employee has filed "Designation of Beneficiary" forms for life insurance (paragraph 8.52F). unpaid compensation in case of death (paragraph 8.51C), or retirement purposes (paragraph 8.54C), new designation forms should be completed and mailed as directed in the paragraphs in parentheses above. The employee should be informed of the effect of marriage or divorce on his health benefits coverage and of his right to change enrollment.

Section 4. Classification, Salary, and Payroll

8.28 AUTHORITY OF DIRECTOR. 18 U.S.C. 3656 provides that the Director of the Administrative Office "shall, under the supervision of the Judicial Conference of the United States, fix the salaries of probation officers and shall provide for their necessary expenses including clerical service and travel expenses."

8.29 CLASSIFICATION OF POSITIONS.

A. Basis of Classification. Positions in the probation offices are classified by the Administrative Office on the basis of the duties and responsibilities of the positions and the minimum education and experience qualifications adopted by the Judicial Conference of the United States in September 1961. These have been described in detail in the Judiciary Salary Plan, a summary of which has been provided to each probation office.

B. Plan of Classification. A brief summary of the salary plan follows:

Title	Grade	Minimum Qualification Requirements
Junior clerk-stenographer	JSP-4	High-school graduate or the equivalent.
Clerk-stenographer	JSP-5	High-school graduate or the equivalent with at least 1 year of experience. Education in a college or university of recognized standing may be substituted for all or part of the year of the required experience on the basis of 1 academic year of education equals 9 months of experience.
Supervisory clerk	JSP-6	High-school graduate or the equivalent with a minimum of 2 years of experience, one of which must have been at the level of clerk-stenographer or the equivalent. Education in a college or university of recognized standing may be substituted for a maximum of 1½ years of the required experience on the basis of 1 academic year of education equals 9 months of experience.
Senior supervisory clerk	JSP-7	High-school graduate or the equivalent with a minimum of 3 years of experience, one of which must have been at the level of supervisory clerk or the equivalent. Education in a college

		or university of recognized standing may be substituted for a maximum of 2 years of the required experience on the basis of 1 academic year of education equals 9 months of experience.
Chief supervisory clerk	JSP-8	High school graduate or the equivalent with a minimum of 4 years of experience, one of which must have been at the level of supervisory clerk or the equivalent. Education in a college or university of recognized standing may be substituted for a maximum of 3 years of the required experience on the basis of 1 academic year of education equals 9 months of experience.
Probation officer assistant	JSP-5	No minimum education requirement. It is recommended that appointee be 21 years of age or older, a citizen of the United States, and in good physical health. He should be mature and responsible and demonstrate a knowledge of the community and its resources. A criminal conviction shall not be an impediment to employment unless a conviction occurred within a period of 12 months prior to application or charges against the applicant are pending. A person having been convicted of bribery of a government official or treason should not be considered for employment as a probation officer assistant. The probation officer assistant must not be under any form of correctional supervision at the time of appointment.
Probation officer (trainee)	JSP-7	(a) A graduate within the upper 20% of the graduating class from an accredited college or university with a bachelor's degree with a major in one of the social sciences, or (b) A graduate of an accredited college with a bachelor's degree and a major in one of the social sciences, plus participation in student activities, such as: (1) election to student offices; (2) editor of the yearbook or other student publications; (3) Leadership in welfare activities sponsored by the college, or

		(c) A graduate of an accredited college or university with a bachelor's degree in liberal arts or social science and a master's degree with a major in social science, or (d) A graduate from an accredited college or university with qualifications which in the opinion of the appointing judge and the Director of the Administrative Office, subject to review by the appropriate committee of the Judicial Conference, are equivalent to (a), (b), or (c) above.
Assistant probation officer	JSP-9	(a) A graduate of an accredited college or university of recognized standing with not less than two years' experience in personnel work for the welfare of others, or (b) A graduate with a bachelor's degree within the upper 20% of the graduating class from an accredited college or university of recognized standing, plus successful completion of 1 year of experience in a systematic and closely supervised training program in the Federal Probation System, or (c) A graduate of an accredited college with a bachelor's degree and a major in one of the social sciences, plus participation in student activities, such as: (1) election to student offices; (2) editor of the yearbook or other student publications; (3) leadership in welfare activities sponsored by the college, plus successful completion of 1 year of experience in a systematic and closely supervised training program in the Federal Probation System, or (d) A graduate with a bachelor's degree with a major in one of the social sciences, plus 1 year of graduate work in one of the social sciences closely related to probation work for which a master's degree has been awarded and, in addition, successful completion of 6 months of experience in a systematic and closely supervised training program in probation work in the Federal Probation System, or

		(e) A graduate with a bachelor's degree and, in addition, a master's degree awarded for 2 years of specialized training in personnel work for the welfare of others in (1) an accredited school of social service, or (2) in a professional course in an accredited college or university of recognized standing, or (f) A graduate from an accredited college or university with qualifications which in the opinion of the appointing judge and the Director of the Administrative Office, subject to review by the appropriate committee of the Judicial Conference, are equivalent to (a), (b), (c), (d), or (e) above.
Associate probation officer	JSP-11	Not less than 1 year of experience in personnel work for the welfare of others as assistant probation officer, or the equivalent, and qualifications required for assistant probation officer.
Probation Officer	JSP-12	Not less than 2 years of experience in personnel work for the welfare of others, one of which must have been as associate probation officer, or the equivalent, in the Federal Probation System, and qualifications required for assistant probation officer.
Supervising probation officer	JSP-13	Three years of experience in personnel work for the welfare of others with at least 1 year of this experience as a probation officer, or the equivalent, in the Federal Probation System, and qualifications required for assistant probation officer.
Deputy chief probation officer	JSP-14	4 years of experience in personnel work for the welfare of others with at least 1 year of this experience in the Federal Probation System as chief probation officer (small office) or supervising probation officer, or the equivalent, and qualifications required for assistant probation officer.
Chief probation officer (small office)	JSP-13	3 years of experience in personnel work for the welfare of others with

		at least 1 year of this experience at the level of a probation officer in the Federal Probation System, or the equivalent, and qualifications required for assistant probation officer.
Chief probation officer (medium office)	JSP-14	4 years of experience in personnel work for the welfare of others with at least 1 year of this experience in the Federal Probation System at the level of chief probation officer (small office) or supervising probation officer, or the equivalent, and qualifications required for assistant probation officer.
Chief probation officer (large office)	JSP-15	4 years of experience in personnel work for the welfare of others with at least 1 year of this experience in the Federal Probation System as chief probation officer (medium office) or deputy chief probation officer, or the equivalent, and qualifications required for assistant probation officer.

C. Salaries in Alaska, Hawaii, and Puerto Rico. To the base salaries of probation personnel in Alaska are added cost of living allowances of 25 percent of the basic salary; to those in Hawaii, 15 percent; and to those in Puerto Rico, 5 percent. The cost of living allowance is not considered a part of the basic compensation and, therefore, is not subject to the retirement deduction of 7 percent.

D. Promotions. Changes from one grade to another are considered individually. They are based on the duties and responsibilities of the position and the individual's demonstrated ability to assume them. The initiation of a promotion action is the responsibility of the chief probation officer or the officer in charge. A recommendation for promotion of a probation officer or probation officer assistant should be submitted in writing to the Probation Division and for a clerical employee to the Personnel Division. It should clearly indicate that the employee has assumed a degree of responsibility commensurate with the higher grade and that the recommended promotion has the approval of the court. The recommendation should be submitted only after the employee has met the minimum qualification requirements established by the Judiciary Salary Plan for the higher grade (see Plan of Classification, paragraph 8.29B). Each chief probation officer or officer in charge should establish a tickler file or similar device to insure that all employees receive due consideration as they become eligible for promotion. Compensation on promotion is limited to the lowest rate of the higher grade except that the difference between the old and new rates must be at least as much as two step increases of the grade from which the employee is promoted.

E. Within-Grade Increases. Within-grade increases are made on the basis of a plan for within-grade promotions of supporting personnel formulated by the Director of the Administrative Office. The plan is based on one adopted in September 1941 by the Judicial Conference of the United States and amended in certain respects, mainly to conform with changes made in the system of promotions for personnel under the Classification Act. It relates to promotional increases in salary within the grades of the positions and not to promotional increases in salary resulting from changes from one grade to another. The plan applies only to full-time personnel of the probation offices. Part-time employees are not included.

Each full-time officer or employee who has not attained the maximum salary for the grade of his position, as fixed by the Administrative Office, will receive a one step increase in compensation at the beginning of the next pay period following the completion of (1) each 52 calendar weeks of active service in within-grade rates 1, 2, and 3; or (2) each 104 calendar weeks of active service in within-grade rates 4, 5, and 6; or (3) each 156 calendar weeks of active service in within-grade rates 7, 8, and 9.

The benefit of successive step-increases will be preserved for officers and employees whose continuous service is interrupted in the public interest by service with the Armed Forces or by service in essential nongovernment civilian employment during a period of war or national emergency.

Within-grade promotions under this plan will be subject to the following conditions: (1) An employee will not be promoted unless his record for efficiency is "good" or better than "good"; (2) promotions will be successive for successive periods of service without intervening promotion and may not be more than one step in any period; (3) a within-grade promotion is not affected by leave without pay, furlough, or absences not in excess of 2 work weeks in the waiting period for rates 2, 3, and 4, 4 work weeks for rates 5, 6, and 7, and 6 work weeks for rates 8, 9, and 10.

8.30 EFFICIENCY RATINGS. The following method is used to estimate the efficiency of probation personnel for the purpose of determining their eligibility for promotion under this plan:

A. The Rating Officer. The chief judge if there is more than one judge, otherwise the judge, will rate without review the chief probation officer in districts having more than one probation officer, and in other districts the probation officer. The chief probation officer in districts having more than one probation officer, and in other districts the probation officer, will rate the other members of his staff.

B. The Scale of Efficiency. The classification used for rating the efficiency of employees will be "excellent," "very good," "good," "fair," and "unsatisfactory," and these terms will have the meaning commonly given them.

C. The Time of Rating. Ratings will be requested annually in December. Rating forms (see Appendix A-8.10) will be supplied by the Administrative Office.

D. The Review of Ratings. Every employee must be given notice of his adjective rating in writing by his rating officer. Any employee, except one whose rating rests in a judge without review, who desires to appeal his efficiency rating will be given an opportunity to do so in writing, within 10 days of receipt of written notice of the rating. The appeal of probation personnel is to the district judge or to the chief district judge if there is more than one judge of the district. A hearing will be held by the judge in the presence of the employee and the rating officer. Both the employee and the rating officer or either may be represented in the hearing by another person at the option of both or either. The judge will determine the final efficiency rating to be assigned without further review.

E. The Procedure in Case of Vacancies in Judgeships. In case of a vacancy in the office of a judge who would normally perform any of the functions relating to efficiency ratings, such functions may be performed by the judge designated to act during the vacancy. The rating form in such cases should bear appropriate notations, showing the name of the acting judge and the rating period covered.

F. The Record of Efficiency Ratings. The rating forms should be transmitted to the Administrative Office for proper notation within 20 days from the date when written notice of the rating is sent to the employee; or, if the rating is reviewed, within 10 days from the date of the decision on review. The rating forms will be retained in the Administrative Office in the personnel file of the employee. Copies of the form may be retained in the probation offices.

8.31 PAYROLL.

A. Compensation. Payment for personal services will be the amount authorized by the personnel notice, AO Form 143.

B. Salary Tables. The salary table issued by the Civil Service Commission, covering per annum employees under the General Schedule of salary rates, is adopted for use in payment of compensation of the officers and employees of the Judicial Branch insofar as it is applicable to regular pay and deductions. The grades and steps under the Judiciary Salary Plan are comparable to those under the General Schedule.

C. Pay Periods. Probation employees are paid on a biweekly basis (5 U.S.C. 5504) and are considered to have an administrative work week of 40 hours. For pay computation purposes, it is assumed that each full-time employee has an 8-hour day unless the Administrative Office is notified to the contrary. The biweekly pay period begins on a Monday and ends on a Sunday.

Form No. USA-52a-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 29th day of July, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Petition for Rehearing or Rehearing En Banc of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Joseph W. Ryan, Jr., Esq.
114 Old Country Road
Mineola, N.Y. 11501

Evelyn Cohen

Sworn to before me this
29th day of July, 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977